

FINAL SETTLEMENT AGREEMENT

ORIGINAL

WHEREAS, the subject of this Settlement Agreement ("Agreement") is the litigation captioned as Northwest Environmental Advocates v. Locke, et al., Civil No. 09-0017-PK, as filed on January 6, 2009, in the U.S. District Court for the District of Oregon ("Lawsuit");

WHEREAS, Plaintiff in the Lawsuit is Northwest Environmental Advocates ("Advocates" or "Plaintiff"); and Defendants in the Lawsuit are Gary Locke, in his official capacity as Secretary of the Department of Commerce, Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), and Dr. Jane Lubchenco, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration ("NOAA") (collectively, "Defendants");

WHEREAS, the State of Oregon implements a coastal zone management program approved by NOAA under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1455;

WHEREAS, the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b, presently require a state with an approved CZMA program, such as the State of Oregon, to develop a Coastal Nonpoint Pollution Control Program ("CNPCP") and submit the CNPCP to NOAA and EPA for approval;

WHEREAS, CZARA, 16 U.S.C. § 1455b(a)(2), requires State CNPCPs to be closely coordinated with State water quality plans, which include water quality standards and Total Maximum Daily Loads ("TMDLs"), developed pursuant to Section 303 of the Clean Water Act ("CWA"), 33 U.S.C. § 1313;

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WHEREAS, CZARA, 16 U.S.C. § 1455b(b)(3), requires State CNPCPs to implement and from time-to-time revise additional management measures for identified land uses and areas as necessary to protect designated uses and achieve and maintain applicable water quality standards under CWA Section 303;

WHEREAS, CZARA, 16 U.S.C. § 1455b(c), requires NOAA and EPA to withhold certain amounts of grant funds available to states under CZMA Section 306, 16 U.S.C. § 1455, and CWA Section 319, 33 U.S.C. § 1329, respectively, when NOAA or EPA, respectively, determine a state has failed to submit an approvable CNPCP;

WHEREAS, Oregon first submitted its CNPCP in 1995, and, in 1998, EPA and NOAA identified forty conditions that Oregon would have to meet to obtain full program approval of its CNPCP, including a condition that Oregon adopt additional management measures for forestry to achieve and maintain water quality standards;

WHEREAS, forested lands are the primary land type in Oregon's coastal areas, and logging in these areas contributes to impairment of water quality and designated uses;

WHEREAS, EPA and NOAA have not fully approved Oregon's CNPCP under CZARA, in part because Oregon has failed to satisfy the condition requiring additional management measures for forestry;

WHEREAS, EPA and NOAA have not withheld any CZMA Section 306 grant funds or CWA Section 319 grant funds from Oregon;

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WHEREAS, the Lawsuit alleges that NOAA and EPA, by not making a final decision approving or disapproving Oregon's CNPCP, and by not withholding CZMA Section 306 grant funds and CWA Section 319 grant funds from Oregon, are in violation of CZARA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706;

WHEREAS, the Lawsuit also stated claims under the Freedom of Information Act, 5 U.S.C. § 552, which Plaintiff and Defendants (collectively, "the Parties") settled and the Court dismissed, with prejudice, on September 18, 2009;

WHEREAS, in 1998, EPA and NOAA determined that Oregon's current Forest Practice Rules are inadequate to achieve and maintain water quality and fully support designated beneficial uses, and reiterated this determination in 2004 and 2008 with respect to riparian protections, high-risk landslide areas, and legacy roads;

WHEREAS, Oregon, in order to resolve the outstanding condition on its CNPCP for additional management measures for forestry, has proposed to develop Implementation Ready TMDLs, which is a new and novel approach to achieving and maintaining water quality standards in the State's coastal sub-basins, and which includes the development and issuance of enforceable load allocations, implementation plans, and "safe harbor" Best Management Practices ("BMPs") throughout Oregon's CNPCP management area (collectively, "Oregon Coastal TMDL Approach");

WHEREAS, on May 12, 2010, EPA and NOAA sent a letter to the State of Oregon, a copy of which is attached hereto as Exhibit A, which encouraged the Oregon Department of

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Environmental Quality (“ODEQ”) to develop additional management measures for forestry, and to resolve the related outstanding condition on its CNPCP, by implementing the Oregon Coastal TMDL Approach, and which stated the agencies’ belief that the Oregon Coastal TMDL Approach, along with measures to address the other outstanding conditions, could enable the State to receive full approval of its CNPCP;

WHEREAS, on July 2, 2010, and in response to EPA and NOAA’s May 12, 2010, letter, the Oregon Attorney General sent a legal opinion, which is attached hereto as Exhibit B, to EPA and NOAA that describes the Oregon Coastal TMDL Approach as a new process by which ODEQ “assigns [load allocations] to individual property owners—including forestland owners—adjacent to the waterbody as opposed to the general [load allocation] for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The [O]DEQ would also establish ‘safe harbor’ BMPs or other ground control measures that it believes to be adequate to meet the [load allocations] to the maximum extent practicable.”;

WHEREAS, the July 2, 2010, legal opinion further concludes that “[O]DEQ is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the [Oregon Board of Forestry] under the [Oregon Forest Practices Act] are deemed by [O]DEQ to be inadequate to implement the TMDL. . . . [O]DEQ

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may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.”;

WHEREAS, the July 2, 2010, legal opinion confirms that ODEQ has the authority to develop and enforce the Oregon Coastal TMDL Approach, specifically proposing that “[i]f the [Board of Forestry] does not adopt basin-specific BMPs or if the [O]DEQ finds that the [Board of Forestry’s] BMPs are not as protective as the safe harbor BMPs, the [O]DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the [O]DEQ for review and approval,” and concluding that “if the [Board of Forestry] does not promulgate such implementation measures, [O]DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA.”;

WHEREAS, on July 26, 2010, ODEQ sent a letter to EPA and NOAA, which letter is attached hereto as Exhibit F, in which ODEQ commits to implementing the Oregon Coastal TMDL Approach, as described in the July 26, 2010, letter and Attachment A to that letter, “in the coastal basins beginning with the Mid-Coast Basin and then in the subsequent coastal basin[s].” The July 26, 2010, letter states that Attachment A was reviewed by the “Oregon Governor’s Office for the specific purpose of identifying options the state would be committed to implement to resolve the conditional approval issues associated with the state’s Coastal Nonpoint Source Control Plan.”;

WHEREAS, in the July 26, 2010, letter, and Attachment A to that letter, ODEQ commits to developing Oregon Coastal TMDLs that will “specifically identify significant nonpoint

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sources, including significant forestry sources,” and ODEQ commits to establishing enforceable load allocations in the TMDLs, and to developing safe harbor BMPs for the load allocations established for those sources, as well as to issuing implementation orders to significant sources, including significant forestry nonpoint sources that have received load allocations through the Oregon Coastal TMDL Approach. Further, Attachment A to the July 26, 2010, letter states that ODEQ will approve or disapprove TMDL Implementation Plans “based on the plans ability to meet the load allocations or [Oregon Board of Forestry] basin specific rule[s]” and that ODEQ “would reserve its authority to impose BMPs under ORS 468B.110 to the extent necessary to comply with Sections 303 and 309 of the CWA.”;

WHEREAS, EPA and NOAA continue to believe that the Oregon Coastal TMDL Approach could meet the additional management measure for forestry, and recognize the importance of the Oregon Coastal TMDL Approach incorporating necessary management practices that will achieve load allocations so as to achieve and maintain water quality standards;

WHEREAS, the Performance Partnership Agreement (PPA)/Performance Partnership Grant (PPG) between EPA Region X and ODEQ for the period July 1, 2010, to June 30, 2012, provides that \$100,000 from the CWA Section 319 funding be used for each of the two years for development of the Oregon Coastal TMDL Approach;

WHEREAS, the Parties presently believe that ODEQ’s commitment to the Oregon Coastal TMDL Approach puts Oregon on a path to meet the condition for additional

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management measures for forestry, which is necessary to achieve full approval of its CNPCP;
and

WHEREAS, the Parties therefore believe that their mutual and individual interests will be best served if any and all remaining disputes between them concerning the issues raised by the Lawsuit are resolved without further litigation.

THEREFORE, in the interests of the public, the Parties, and judicial economy, the Parties hereby agree as follows:

1. On or before November 15, 2013, NOAA and EPA shall sign for prompt publication in the Federal Register a notice announcing a proposed decision to either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's CNPCP, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4). If EPA and NOAA propose to approve Oregon's CNPCP, the Federal Register notice shall announce a thirty (30) day public comment period on that proposal. If EPA and NOAA propose to find that Oregon has failed to submit an approvable program, the Federal Register notice shall announce a ninety (90) day public comment period on that proposal and shall also announce EPA's and NOAA's intent, pursuant to 16 U.S.C. § 1445b(c)(3) and (4), to withhold CWA Section 319 and CZMA Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies' finding. EPA or NOAA shall provide Advocates with a copy of the proposed final decision prior to or concurrent with publishing it in the Federal Register. EPA and NOAA may

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use the process outlined in the October 16, 2003, memorandum from Diane Regas, entitled “Approving and Disapproving State Programs under the Coastal Zone Act Reauthorization Amendment of 1990” to guide their final review and decision-making process. The October 16, 2003, Diane Regas memorandum is attached to this Agreement as Exhibit C.

2. On or before May 15, 2014, EPA and NOAA shall either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon’s CNPCP, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4). If EPA and NOAA make a finding that the State of Oregon has failed to submit an approvable program, the agencies shall, pursuant to 16 U.S.C. § 1455b(c)(3) and (4), withhold CWA Section 319 and CZMA Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies’ finding and in all future years unless and until EPA and NOAA issue a Full Approval Decision Memorandum approving the State’s CNPCP without conditions. After May 15, 2014, EPA and NOAA shall not award full CWA Section 319 or CZMA Section 306 grant funds to Oregon based on any conditional approval of Oregon’s CNPCP. EPA or NOAA shall provide Advocates with a copy of the final decision within five days of it being signed.

3. In their review of ODEQ’s proposed schedule for implementing the Oregon Coastal TMDL Approach throughout Oregon’s CNPCP management area, EPA and NOAA will consider Advocates’ comments on ODEQ’s proposed schedule. EPA and NOAA shall review ODEQ’s proposed schedule to ensure that it provides a reasonable timeline for implementing the

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State's additional management measures for forestry and that it includes developing or updating TMDLs for all sub-basins in the CNPCP management area using the Oregon Coastal TMDL Approach.

4. Pursuant to 33 U.S.C. § 1329(h), and through the CWA Section 319 program generally, EPA shall continue to work with ODEQ to provide that future agreements regarding the use of performance partnership funding be used to assist Oregon in implementing its Oregon Coastal TMDL Approach throughout the CNPCP management area to ensure that forestry impacts to water quality are addressed. Additionally, pursuant to 16 U.S.C. § 1455b(d), and to assist Oregon with satisfying the condition on Oregon's CNPCP that requires the adoption of additional management measures for forestry, EPA and NOAA will consider and respond to any requests by ODEQ for technical assistance with developing and implementing the Oregon Coastal TMDL Approach, including requests by ODEQ to provide preliminary feedback as to whether proposed safe harbor BMPs in the Mid-Coast Basin TMDLs could achieve Oregon water quality standards.

5. By December 31, 2012, pursuant to their authorities under 16 U.S.C. § 1455b(d), and based upon Oregon's July 2, 2010, Attorney General's Opinion, the July 26, 2010, ODEQ commitment letter, the schedule for implementing the Oregon Coastal TMDL approach that EPA and NOAA requested the state submit by March 31, 2011, the Mid-Coast Basin TMDLs implementing the Oregon Coastal TMDL Approach that EPA and NOAA requested the state to submit by June 30, 2012, and any other information, EPA and NOAA shall provide ODEQ with

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a written initial assessment. This written initial assessment will evaluate (a) whether implementation of the Oregon Coastal TMDL Approach in the Mid-Coast Sub-basins, including the safe harbor BMPs, is likely to result in actions that achieve and maintain water quality standards, and (b) whether Oregon's plan for developing and updating TMDLs for all sub-basins in the CNPCP management area using the Oregon Coastal TMDL Approach could satisfy the outstanding forestry condition on Oregon's CNPCP under 16 U.S.C. § 1455b(b)(3). In developing their initial assessment, EPA and NOAA shall consider any comments Plaintiff may have submitted with respect to ODEQ's proposed TMDLs and BMPs. EPA and NOAA shall send a copy of the written initial assessment to Plaintiff.

6. In addition to the fees already paid as part of the settlement of Plaintiff's FOIA claims (claims four and five) in the Lawsuit, EPA and NOAA shall pay Plaintiff a total of eighty-three thousand five hundred dollars and no cents (\$83,500.00) for costs and attorneys' fees arising out of the APA claims (claims one, two and three) in the Lawsuit. EPA and NOAA shall make the payments required by this Paragraph within ninety (90) days of the date of entry of the Agreed Order (attached hereto as Exhibit D) dismissing the APA claims without prejudice. Payment shall be made to the Washington Forest Law Center. Payment may be made by electronic funds transfer or by check made payable and sent by First Class Mail to: Washington Forest Law Center, c/o Paul Kampmeier, 615 Second Ave., Suite 360, Seattle, Washington 98104. After entry of the Agreed Order that is attached hereto as Exhibit D, Plaintiff shall provide Defendants with the necessary account information for electronic funds transfer.

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7. Plaintiff agrees that receipt of the payment required by Paragraph 6 of this Agreement shall operate as a release of Plaintiff's present claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, for the fees, expenses, and costs incurred through and including the date of this Agreement. Plaintiff shall provide written communication to Defendants to confirm Plaintiff has received the funds. This Agreement, the release described in this Paragraph, and the payments required by Paragraph 6 of this Agreement shall not in any way limit Plaintiff's right or ability to seek or collect costs and attorney fees incurred in any other lawsuit, including any lawsuit that raises claims identical or similar to those raised in the Lawsuit.

8. Within five (5) days of the full execution of this Agreement, and pursuant to Federal Rule of Civil Procedure 41(a), the parties shall file with the United States District Court for the District of Oregon the Agreed Order and Stipulations that are attached to this Agreement as Exhibits D and E. Should the Court, for any reason, modify, alter, or refuse to enter the Agreed Order that is attached hereto as Exhibit D, this Agreement will be void, and the Parties will meet and confer to determine whether they can finalize a settlement agreement that accommodates the Court's concerns.

9. In the event that Advocates, EPA, or NOAA believe that any party to this Agreement has failed to comply with any term or condition of this Agreement, or in the event that there is any dispute or controversy about any part of this Agreement, the parties shall use their best efforts to settle and resolve the controversy. To that end, the party raising the dispute

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shall commence an informal dispute resolution period, to be no shorter than thirty (30) days, by giving written notice to the other party(s) stating the nature of the matter to be resolved and the position of the party asserting the controversy. The Parties shall consult and negotiate with each other in good faith and, recognizing their mutual interests in the ongoing integrity of this Agreement, attempt to reach a just and equitable solution satisfactory to all parties. If, after implementation of the informal dispute resolution process in this Paragraph, EPA or NOAA have not performed the obligations established in Paragraph 6 of this Agreement, Plaintiff may seek enforcement of the Agreed Order dismissing claims one, two, and three without prejudice. If, after implementation of the informal dispute resolution process in this Paragraph, EPA or NOAA have not performed any other obligation established in this Agreement, Plaintiff's sole judicial remedy will be to re-initiate litigation on or after December 16, 2013.

10. Any notices required or provided for by this Agreement shall be in writing, effective upon receipt, and sent to the following:

For Northwest Environmental Advocates:

Paul A. Kampmeier, Staff Attorney
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104

Allison LaPlante
Pacific Environmental Advocacy Center
Lewis and Clark Law School
10015 SW Terwilliger Blvd
Portland, Oregon 97219

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Nina Bell, Executive Director
Northwest Environmental Advocates
P.O. Box 12187
Portland, Oregon 97212-0187

For Defendants:

Kristofor R. Swanson
U.S. Department of Justice
Environmental & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663

Stephanie Campbell
Attorney-Adviser
Office of General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
1305 East-West Highway, Suite 6111
Silver Spring, MD 20910

John King
Chief, Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Ocean Service
National Oceanic and Atmospheric Administration
1305 East-West Highway, Room 11305
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Ankur Tohan
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900 (ORC-158)
Seattle, Washington 98101

David Powers
Regional Manager for Forests and Rangelands
U.S. EPA Region 10, OOO
805 SW Broadway, Suite 500

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Portland, OR 97205

or such other person as either party may designate in writing to the other parties.

11. The parties agree that nothing in this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that EPA or NOAA take action in contravention of the APA or any other law or regulation. With respect to EPA's and NOAA's final decision on Oregon's CNPCP, nothing in this Agreement shall be construed to limit or modify the discretion accorded to EPA and NOAA by the APA, CZARA, or general principles of administrative law.

12. The parties agree that nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that EPA or NOAA obligate or pay any funds exceeding those available, or take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

13. This Agreement and the Agreed Order and Stipulations set forth in Exhibits D and E constitute the entire agreement of the Parties, and no statements, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced. Except as expressly stated herein, this Agreement and the Agreed Order and Stipulations set forth in Exhibits D and E supersede all prior agreements, negotiations, and discussions between the parties with respect to the subject matters discussed herein.

14. This Agreement may be modified or amended only by written agreement signed by all parties.

15. The terms of this Agreement shall become effective upon execution by all parties.

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16. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to and bind them to the terms and conditions of this Agreement and do hereby agree to the terms herein, including EPA's and NOAA's obligations under Paragraph 6.

17. The parties agree that this Agreement was negotiated and entered into in good faith and that it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. Nothing in this Agreement shall be interpreted as, or constitute, an admission of liability or fact or a waiver of any claims or defenses. Advocates reserves the right to challenge and/or appeal any decision or action by ODEQ, EPA, or NOAA, including but not limited to any TMDL submitted by ODEQ to EPA and any final decision by EPA and NOAA on Oregon's CNPCP.

18. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid. If a court finds any provision of this Agreement to be prohibited by or invalid under applicable law, the Parties shall work together in good faith to implement the letter and spirit of this Agreement to the extent possible. In no event shall Plaintiff be required to return the payments required by Paragraph 6 of this Agreement.

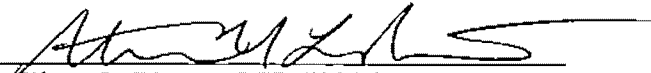
Approved by Counsel for the parties:

Date: Sept. 22, 2010 WASHINGTON FOREST LAW CENTER

By: Paul A. Kampmeier
Paul A. Kampmeier, WSBA #31560


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Date: 9/23/10 PACIFIC ENVIRONMENTAL ADVOCACY CENTER

By: 
Allison LaPlante, OSB #02361

Attorneys for Plaintiff Northwest Environmental Advocates

Date: 9/27/2010 U.S. DEPARTMENT OF JUSTICE

By: 
Kristofer R. Swanson, Colo. Bar # 39378

Attorneys for Defendants Gary Locke, Lisa P. Jackson, and
Dr. Jane Lubchenko